No. 79-169

In the Supreme Court of the United States

OCTOBER TERM, 1978

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor

LYNN N. HARGIS
Assistant General Counsel
Federal Energy Regulatory Commission
Washington, D.C. 20426

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 600 F.2d 944. The opinions and orders of the Commission [1] (Pet. App. 46a-71a)

[1] The Federal Energy Regulatory Commission succeeded to the relevant responsibilities of the former Federal Power Commission over wholesale electric rates effective October 1, 1977. Section 402(a)(1)(B), Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 584, 42 U.S.C. (Supp. I) 7172(a)(1)(B). Hereinafter, "Commission" refers to the FERC or the FPC depending on whether the events described occurred before or after October 1, 1977.

are unreported. The initial decision of the Commission's Administrative Law Judge (App. B, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1979. An order denying a petition for rehearing filed by other parties was entered on July 3, 1979 (App. A, *infra*). The petition for a writ of certiorari was filed on August 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission properly rejected a portion of a wholesale electric tariff proposing to collect, by means of a surcharge on the new energy element of the rate, fuel costs not recovered by the prior tariff's automatic fuel adjustment clause.

STATUTE INVOLVED

Pertinent provisions of Part II of the Federal Power Act, ch. 687, 49 Stat. 847-854, 16 U.S.C. 824-824h, are set forth in the Appendix to the petition (Pet. App. 72a-75a).

STATEMENT

The issue in this case is substantially the same as the question presented by the pending petition in *Jersey Central Power & Light Co.* v. *FERC*, No. 78-1665. In the Commission's brief in opposition in that case we have discussed at some length the function of

fuel adjustment clauses, the technical and legal background of the issue, and the related decisions by the courts of appeals. We refer the Court to that discussion, and set forth here only the specific facts pertinent to this case.[2]

1. Petitioner, Public Service Company of New Hampshire (PSNH), is a public utility selling electricity at wholesale in interstate commerce under Section 201(e), Federal Power Act, ch. 687, Part II, 49 Stat. 848, 16 U.S.C. 824(e).

In 1973, PSNH filed a tariff with an automatic fuel adjustment clause that became effective in January, 1973. The base period cost of fuel was updated in February, 1975, but the method of computing current charges remained the same (Pet. App. 37a-38a). The clause provided that a fuel cost adjustment would be calculated as the difference between the actual cost of fossil fuels burned in generating energy and the fixed base period cost of such fuel as specified in the clause. The clause further provided (Pet. App. 37a) that this adjustment, whether charge or credit (emphasis supplied):

> * * * shall be applied to kilowatt-hours billed pursuant to meter readings taken in any calendar month and shall be in an amount determined monthly based upon costs and quantities of fuels burned and all other required data taken from or applicable to the *second preceding month*.

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[2] The brief in opposition in No. 78-1665 has been served upon counsel for petitioner.

Thus, for example, under the formula, bills for kilowatt-hours supplied in March were adjusted for fuel costs actually incurred in the second preceding month, *i.e.*, January.

In November, 1975, PSNH filed tariffs with the Commission proposing to change the fuel adjustment clauses in seven of its FPC wholesale electric rate schedules (R. 867).[3] The new clauses became effective January 1, 1976, subject to refund (Pet. App. 48a).[4] PSNH proposed *inter alia* to change its adjustment clause so that its monthly charges would be based on data for the current billing period rather than from two months back. To accomplish this, the new clause provided for an adjustment based on actual fuel costs incurred for the first two-thirds of the current month, and an estimate of the current costs and quantities of fuel burned for the last third; this amount was to be subsequently adjusted in the next succeeding month when actual costs were known (Pet. App. 64a).

In addition to these changes in the fuel adjustment clause, PSNH proposed to collect a surcharge to recover "deferred" fuel costs which the utility con-

[3] "R." refers to the certified record in the court of appeals.

[4] The tariff changes were purportedly to conform PSNH's fuel cost adjustment clauses to a Commission order requiring that nuclear, as well as fossil fuel costs, be included in the base period fuel cost specified in fuel cost adjustment clauses (R. 868). Commission Order No. 517, "Order Amending Section 35.14 of the Regulations under the Federal Power Act," 52 F.P.C. 1304 (1974), 18 C.F.R. 35.14 (1977).

tended were incurred under the prior fuel clause, and which became uncollectable when the change was made to the new, current fuel clause (R. 868). It is the lawfulness of the surcharge that is at issue in this case.

2. In an initial decision after hearings under Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), an Administrative Law Judge held that the surcharge was not just and reasonable (App. B, *infra*). The decision distinguished between cost of service tariffs which reimburse the utility exactly for its cost of providing service, plus a specified rate of return on its rate base, and fixed rate tariffs, under which customers pay a predetermined price per unit based on costs incurred in a past "test period," subject to some adjustments (App. B, *infra*, 6a-7a). Under a fixed rate tariff, there is no guarantee that all actual costs will be recovered or that only actual costs will be recovered; in practice, actual recovery is always more or less than the costs incurred. Under a cost of service tariff, on the other hand, all costs are recovered, but no more (*ibid.*). The Administrative Law Judge found that PSNH's prior fuel clause, which used costs from two months preceding the billing month to calculate charges, was a fixed-rate tariff that used past data to calculate current charges. Since the proposed surcharge was intended to collect past costs not recovered by the prior fuel clause, it was invalid because it constituted retroactive ratemaking (App. B, *infra*, 8a-10a).

The Commission affirmed in Opinion No. 790 (Pet. App. 46a-65a). It agreed with the initial decision's finding that PSNH's prior fuel clause used past month's fuel costs as "test period" costs for computing current fuel adjustment charges. The Commission also agreed that even though the company's filed rate may not have adequately recovered its costs, the Commission was not authorized to permit a retroactive increase in that rate (*id.* at 62a).

3. On petition for review, the court of appeals affirmed (Pet. App. 1a-45a). It held that the Commission had properly characterized PSNH's superseded fuel adjustment clause as a fixed rate tariff, that the Commission's interpretation of such clauses is entitled to "a considerable amount of deference," and that the Commission's characterization was " 'amply supported' " (*id.* at 20a).

In light of this characterization, the Court sustained the Commission's conclusion that the surcharge was a retroactive rate increase which the Commission is not authorized to approve (Pet. App. 25a-36a). That approach, the court noted, had been adopted by the Third [5] and Fourth Circuits.[6] The court expressly disagreed (Pet. App. 25a-36a), however, with the First Circuit's decision in *Maine Public Service Co.* v. *FPC*, 579 F.2d 659 (1978), which had remanded to the Commission a similar surcharge rejection on the ground that the Commission had too

[5] *Jersey Central Power & Light Co.* v. *FERC*, 589 F.2d 142 (3d Cir. 1978), petition for cert. pending, No. 78-1665.

[6] *Virginia Electric & Power Co.* v. *FERC*, 580 F.2d 710 (4th Cir. 1978).

narrowly construed the rule against retroactive ratemaking as applied to fuel cost adjustment clauses.[7]

ARGUMENT

The considerations that warrant denial of the petition for a writ of certiorari in *Jersey Central Power & Light Co.* v. *FERC*, No. 78-1665, also apply to this case.

PSNH's proposed surcharge in this case was designed to collect, under its new tariff, fuel costs incurred in November and December 1975, when the old tariff was in effect. PSNH claimed that this was necessary upon transition to the new tariff, because those costs would otherwise be lost. This resulted from the two-month lag, under PSNH's old adjustment clause, before the actual fuel costs incurred during a given month could be included in charges to be billed. PSNH claimed that this was permissible because it characterized the "lag" in the old adjustment clause as simply a "deferral" in the recovery of costs incurred in a given month until two months later (R. 868).

As in *Jersey Central*, *supra*, the issue is one of characterization: did PSNH's original fuel clause

[7] The court in the instant case affirmed similar orders involving three other utilities. It remanded to the Commission orders concerning surcharges proposed by the *Appalachian Power Company*, Nos. 77-2004, 77-2005 (D.C. Cir.), on the ground that no hearing had been held and the record was insufficient to properly characterize the tariff (Pet. App. 21a-25a). The Commission is not seeking review of this ruling.

provide for deferred recovery of costs actually incurred, as in a cost-of-service tariff, or for recovery on the basis of costs in a specified period, as in a fixed rate tariff?

The Commission expressly held (Pet. App. 61a):

> The use of the November and December, 1972, costs as a basis for determining the fuel adjustment charge for January and February, 1973, is characteristic of a fixed rate tariff, which provides current compensation on the basis of costs incurred during a past period. * * * It is clear that the fuel clause which became effective in January, 1973, was never intended to permit PSNH to charge its January customers for fuel costs incurred in November, 1972. The intent was to use the November experience, the most recently available data, as a measure of the January fuel expense which would be recoverable from customers using power in January.

The court of appeals agreed with the Commission's interpretation for three reasons. First, the design of the superseded fuel clauses was inconsistent with a cost of service tariff because the fuel adjustment factor based on a particular month's fuel costs was applied to the amount of energy used by a customer in a *different* month. This mismatch of costs from one period with energy supplied in another meant that exact recovery of actual fuel expenses would not occur (Pet. App. 16a-17a). Second, if the clause were a method of deferred billing, then PSNH would not have begun billing under it immediately

after it was instituted in January, 1973, as it did,[8] but would have deferred collections for two months after the clause was first instituted (Pet. App. 17a-19a). Third, "the language and tone of the superseded fuel adjustment clause[] is consistent with the Commission's conclusion that [it was a] fixed rate tariff[]" (Pet. App. 19a). The clause emphasized a formula that does not recover fuel costs exactly, and contains no explicit language indicating that fuel tion is "amply supported."

The court's reasoning is correct. The court also properly recognizes (Pet. App. 20a) that such matters are primarily the responsibility of the Commission, and that with respect particularly to questions of tariff interpretation and the parties' intent, it is appropriate to defer to the Commission's judgment if its decision is "amply supported both factually and legally." *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 114 (1958). In light of the court of appeals' probing examination of the record, there is no reason for this Court to review its determination that the Commission's characterization is "amply supported".

Having found PSNH's superseded fuel adjustment clause to have been a fixed rate tariff, the Commission correctly concluded that the Federal Power Act

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[8] The initial decision expressly found that "the bills sent to PSNH's wholesale customers in January, 1973, the month the superseded clause went into effect, were calculated on the basis of fuel cost data for the two months *before* the clause went into effect" (App. B, *infra*, 8a-9a (emphasis in original)).

precludes approval of the surcharge. This conclusion rests on the rule against retroactive ratemaking and the related "filed rate" doctrine that a utility may charge only those rates set forth in tariffs on file with the Commission. See FERC Br. in Opp. in *Jersey Central*, No. 78-1665, *supra*, at 11-12.

Although the decision of the court of appeals in this case conflicts with the First Circuit's result in *Maine Public Service Co.* v. *FPC*, 579 F.2d 659 (1978), the conflict does not warrant this Court's review, at least at this time. As we explained in the Commission's brief in opposition in *Jersey Central* (pages 12-14), the issue has resulted from transitions from one kind of fuel adjustment clause to another, is unlikely to recur,[9] and depends in large part on the language and intent of particular tariff provisions.

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[9] The First Circuit will have an opportunity to reconsider this issue on petition for review of a similar Commission order in *Boston Edison Co.* v. *FERC*, No. 79-1179, involving a proposed surcharge to a fuel adjustment clause initially tendered to the Commission in August, 1975, and finally held unlawful by the Commission order issued January 12, 1979, rehearing denied March 12, 1979. Except for the remanded proceedings in *Maine Public Service Commission* v. *FPC*, *supra*, and *Appalachian Power Co.* v. *FERC*, *supra*, note 7, page 7, the pending petition in *Jersey Central*, *supra*, and any other petitions that may be filed in this case, there appear to be no other active proceedings before the courts or the Commission involving transitional surcharges on fuel cost adjustment clauses under the Federal Power Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor

LYNN N. HARGIS
Assistant General Counsel
Federal Energy Regulatory Commission

SEPTEMBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 78-1329

[Filed Jul. 3, 1979]

PENNSYLVANIA ELECTRIC COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
INTERVENOR

And Consolidated Case No. 78-1330

BEFORE: Tamm and MacKinnon, Circuit Judges; and Pratt*, District Judge, United States District Court for the District of Columbia

ORDER

Upon consideration of petitioners' (Pennsylvania Electric Company and Metropolitan Edison Company) petition for rehearing, it is

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ORDERED, by the Court, that petitioners' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. ER76-285

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

INITIAL DECISION WITH RESPECT TO FUEL ADJUSTMENT CLAUSE

(November 17, 1976)

APPEARANCES

George F. Bruder for Public Service Company of New Hampshire

E. David Doane and *Harry H. Voigt* for Concord Electric Company and Exeter & Hampton Electric Company

Daniel Guttman, Tom McHugh and *Sandra Spiegel* for New Hampshire Electric Coop; Cities of Ashland and Wolfeboro, New Hampshire, Village Precinct of Hampton, New Hampshire

Thomas N. McHugh for New Hampshire Corporation, Wolfeboro and New Hampton

Eugene R. Elrod for the Staff of the Federal Power Commission

HOWE, PRESIDING ADMINISTRATIVE LAW JUDGE: On November 21, 1975, the Public Service Company of New Hampshire (PSNH) tendered for filing proposed rate changes in seven of its rate schedules,[1] asserting that the changes are necessary

[1] FPC No. 24 (Concord Electric Co.), FPC No. 28 (Town of Ashland, N.H. Electric Light Dept.), FPC No. 29 (New

to conform the rate schedules to the Commission's fuel clause regulations (18 CFR 35.14) as amended by Commission Order No. 517, 52 FPC 1304 (1974). The Commission accepted the proposed changes for filing by order of December 19, 1975, and suspended their use until January 1, 1976, when they became effective subject to refund. The same order granted the intervention petitions of each of the customers whose rates are potentially affected by the proposed changes, New Hampshire Electric Cooperative, Inc., the Towns of Ashland and Wolfeboro, New Hampshire, and the Village Precinct of New Hampton, New Hampshire (Intervenors).

On February 9, 1976, the Commission designated for hearing two issues arising from the proposed changes: (1) a temporary surcharge designed to recover $1,636,210 which PSNH contends are costs incurred by it and not recovered from its customers for the months of November and December, 1975, as a result of the two month lag in its billing system under the superseded fuel adjustment clause, and (2) PSNH's use of fuel cost estimates to permit current month billing. At hearing both the Staff and Intervenors objected to the proposed surcharge. Only Intervenors objected to PSNH's use of fuel cost estimates.

Hampton Village Fire Precinct), FPC No. 35 (Exeter & Hampton Electric Co.), FPC Nos. 50 and 71 (New Hampshire Electric Cooperative), and FPC No. 72 (Town of Wolfeboro, N.H. Municipal Electric Dept.).

The Proposed Surcharge

The filing of PSNH's new fuel schedule was prompted by the Commission's Order No. 517, 52 FPC 1304 (1974), which required all jurisdictional utilities to conform their fuel adjustment clauses to new requirements set forth therein. There is no dispute by the parties as to the necessity of PSNH to revise its fuel adjustment clause.

PSNH's superseded fuel adjustment clause, which expired December 31, 1975, provided for a base fuel cost of $0.00457045 per KWH and a two month lag in the base period on which adjustment is to be computed; that is, the actual fuel costs per KWH experienced in the second preceding month were compared with the base fuel cost to find the adjustment factor, which was then applied to the current month energy billing determinants.[2] In this way, fuel costs incurred by PSNH are reflected two months later in its bill to wholesale customers. Along with the filing of new rates, PSNH chose to implement current month billing[3], thereby eliminating the two month

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[2] This lagging billing was approved by the Commission and was not precluded by the statutory prohibition against retroactive ratemaking.

[3] PSNH clearly states that the change to current month billing was voluntary and not responsive to Order No. 517. In its Initial Brief at p. 3, PSNH states: "In addition to the several changes mandated by the order, [PSNH] . . . eliminated the two month lagging feature of fuel clause billing and substituted current month billing." Nor was the change made in compliance with an order of the New Hampshire Public Utilities Commission. Supplemental Order No. 12,427 of that Commission specifically denied that its earlier decision was intended to require a change in accounting procedures.

lag. It is apparent, therefore, that as of the effective date of the new rate schedule, January 1, 1976, past fuel costs could no longer be used to calculate (current) fuel bills. PSNH has requested that it be permitted to impose a surcharge on its wholesale customers to recover its fuel costs for November and December, 1975, which, under the now superseded fuel adjustment clause, would have determined fuel bills in January and February, 1976.

The surcharge, as originally set forth by PSNH, sought to recover a total of $1,737,177 in twelve monthly payments. PSNH has offered two modifications to its proposal: (1) in response to arguments from its wholesale customers that the collection of $1,737,177 over only one year would cause cash flow problems, PSNH has offered to spread out its recovery over two or three years; and (2) PSNH has offered to reduce the total amount recovered by the surcharge to $1,636,210. The reduction of $100,967 represents the amount recovered by PSNH under its superseded clause in January and February, 1973, on the basis of fuel costs in November and December, 1972, the two months preceding the effective date of its superseded fuel adjustment clause. It is now necessary to determine whether PSNH is entitled to recover through a surcharge the amount it alleges it did not recover from its wholesale customers as a result of its change to current month billing.

There are two basic types of rate tariffs used by utilities: (1) a cost of service tariff, in which sellers are reimbursed penny for penny for costs incurred

in providing service and are given a specified rate of return on those costs, and (2) a fixed rate tariff in which customers pay a predetermined price per unit based on costs incurred during a past test period, subject to some adjustments.[4] For many years this latter type of tariff, the fixed rate, was used almost exclusively by utilities. Because costs were steady or decreasing, rate changes were comparatively seldom sought, and customers often paid prices which produced a rate of return in excess of that which had been found appropriate by the Federal Power Commission. As costs, and particularly fuel costs, began to rise, utilities appeared before the Commission more frequently to request increases in rates. This resulted in a diminishing lag between the test period on which rates were based and the billing month. Nevertheless, the shortened lag proved still too great to produce revenues approximating fuel costs.

Fuel adjustment clauses were devised as a partial remedy. Those like PSNH's superseded clause allow a utility to regularly change its test period for fuel costs to predetermined intervals prior to billing with-

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[4] Some confusion arises because the costs for the *past* test period are computed as a cost of service computation for that period, with some adjustments. Under a fixed rate tariff, there is no guaranty that current costs (including return) will be recovered, or that nothing more than such current costs will be recovered. In practice the actual recovery is always more or less than the costs incurred. Under a cost of service tariff, in contrast, the utility will recover all its full current costs, but no more.

out applying to the Commission for such change. In other words, such adjustment clauses do no more than facilitate changes in the test period for fuel costs; the fuel adjustment clauses remain fixed rate computations. Such fuel adjustment clauses do not transform fixed rate tariffs into cost of service tariffs. The ultimate effect of such clauses is to relate fuel charges more closely to fuel costs, but the exact fuel costs are not recovered as they would be in a cost of service tariff.

PSNH asserts that rates under its superseded fuel adjustment clause were intended to recover actual past fuel costs. It is true, of course, that any fixed rate tariff is designed to recover approximately the utility's costs, but as has been pointed out, the practical effect of a fixed rate tariff is that the utility almost invariably recovers more or less than its current costs. A cost of service tariff, on the other hand, yields neither more nor less than its current costs.

Examination of the first two months and the last two months of PSNH's superseded tariff is enlightening. As indicated above, PSNH has offered to reduce the total amount to be recovered by its surcharge from $1,737,177 to $1,636,210.[5] The difference, $100,967 represents the amount recovered by the superseded fuel adjustment for November and December, 1972, the two months *preceding* the effective date of the superseded clause. That is, the

[5] Initial Brief for Public Service Company of New Hampshire, p. 5.

bills sent to PSNH's wholesale customers in January, 1973, the month the superseded clause went into effect, were calculated on the basis of fuel cost data for the two months *before* the clause went into effect. If the fuel adjustment clause had been intended to be used to recover these costs, rather than as test period data to establish rates for a later period, this action on the part of PSNH clearly would have constituted retroactive ratemaking. PSNH cannot support its argument that its fuel adjustment clause was always intended to recover past fuel costs by offering now to return the money it collected based on fuel costs incurred in the two months before the superseded fuel clause went into effect.

In November and December, 1975 the last two months of operation under PSNH's superseded fuel adjustment clause, the amount PSNH collected was not determined by its costs in November and December, but by its costs in September and October, 1975. This, of course, is characteristic of a fixed rate type fuel adjustment clause, which provides *current* compensation on the basis of costs during a *past* period. The failure of a fixed rate type clause to recover the full amount of costs then current is no ground to provide for collecting the unrecovered portion by upward adjustment of rates for a later period through surcharge or otherwise. To allow such recovery would be retroactive ratemaking.

It follows that any costs not recovered by PSNH under its superseded fuel adjustment clause, which was a fixed rate type tariff, cannot be recovered by a

later surcharge. The fuel adjustment clause presently used by PSNH is a cost of service clause, under which PSNH may recover all its cost *during the period when the present clause is effective.* That clause did not become effective, however, until January 1, 1976, and cannot be used to recover cost incurred in any earlier period.

Administrative Law Judge Kanell, in *Gulf Power Company*, Docket No. E-8911, reached a similar conclusion. He stated, at page 16:

> While regulation must protect both ratepayers and Gulf's investors, Gulf cannot be expected to be fully protected from all changes in its cost of operation that may reflect upon its profits. . . . [T]he purpose of the fuel adjustment clause is to keep the revenues derived by Gulf reasonably in line with the cost of fuel. . . . Therefore, while the fuel adjustment clause is designed to reflect increased costs through rate adjustments, such a clause cannot relieve Gulf of all risks of doing business. Stated otherwise, to authorize Gulf to make up for unrecovered fuel costs in any prior period is similar to designing rates for the future to make up for prior operating losses or periods of depressed earnings. The Federal Power Act authorizes the Commission to prescribe rates prospectively, not retroactively.

Fuel Cost Estimates

Under its proposed rate tariff, which incorporates current month billing, PSNH uses fuel cost estimates for a certain portion of its necessary computation

data. As explained by PSNH in its initial brief at page 11:

> PSNH's current month fuel cost billing process adds the actual, calculated fuel costs for the first 2/3 of the current month to estimated costs for the last 1/3 of the month (Tr. 91,93), and adjusts the total to reflect the difference, if any, between the estimated and corresponding subsequent actual data for the preceding month.

Intervenors object to the use of estimated costs on the ground that Order No. 517 does not specifically provide for them. Neither, however, does it prohibit their use. In circumstances where allocation of fuel costs between jurisdictional and non-jurisdictional customers must be made, it is obvious that estimates are used. Such allocation estimates need not invariably be on a *pro rata* basis if it can be shown that by reason of the nature of the service rendered the fuel cost per energy unit furnished differs with different customers. The use of such estimates does not render the result subject to attack. It is concluded that there is nothing in Order No. 517 which precludes the use of estimates.

Allocations are also used in computing costs under cost of service tariffs, in which the objective is to determine actual current costs. It follows that nothing is improper in using estimates under a cost of service adjustment factor for the third of the month as to which actual fuel costs are not established, especially where the small differential between esti-

mates and actuality will be adjusted in the next month's billing.

It is concluded that PSNH's use of fuel cost estimates is not objectionable. Such use is necessary if PSNH is to implement a fuel adjustment clause based on its current costs. In view of the rapid past and prospective rise in fuel costs, such a fuel adjustment clause seems the most practicable way of achieving the objective of providing full recovery of costs incurred.

Motion To Reopen Record And For Accounting

On October 21, 1976, Intervenors moved to reopen the record and requested an accounting. An audit revealed that PSNH has billed customers for approximately 125,000 tons of coal under its prior and present fuel adjustment clauses although this coal was never consumed. PSNH would make its customers whole for the overcharge by crediting their later bills. Intervenors, however, wish to make certain that the overcharges are correctly computed for each customer. It also suggests that interest at 9 percent is due the customers from the dates of the overcharges.

PSNH contends that the Commission order issued February 9, 1976 denying rehearing of its earlier order accepting PSNH's filing of the fuel adjustment clause presently in effect, limited the scope of this proceeding to specific issues, not including those raised by Intervenors' motion. The Commission order, however, does not appear to limit the scope of this proceeding in any way. Certain issues were dis-

cussed merely for the purpose of meeting objections to the acceptance of the filing, but the Commission did not direct that any issues which might properly be raised in a Section 4 proceeding be excluded.

Nevertheless, it is concluded that the relief sought extends beyond the scope of this proceeding. The fuel adjustment clause with which we are concerend became effective January 1, 1975. It could be argued that an accounting might be ordered for the period after January 1, 1975, to determine the amount of possible refunds of money collected under the fuel adjustment clause here in question. The accounting sought here, however, would extend back to 1971, thus embracing several years prior to the time with which this proceeding is concerned. It does not appear desirable that the accounting should be fragmented by considering the post-1974 period in this proceeding and the earlier period in a separate proceeding.

An Administrative Law Judge has no power to initiate a new proceeding or enlarge the scope of an existing proceeding. A motion to effectuate what Intervenors desire would have to be made to the Commission. Accordingly, the motion is denied without prejudice to its presentation to the Commission in the event the participants are unable to resolve the matter among themselves.

It is ORDERED, that Public Service Company of New Hampshire shall, within 30 days of the time a decision herein becomes final and no longer subject to judicial review,

(1) file a fuel adjustment clause revised in accordance with this initial decision,

(2) file and serve upon participants affected refund computations in accordance with this initial decision, and

(3) make refunds, with interest, of excessive amounts collected as shown in said computations.

/s/ Thomas L. Howe
THOMAS L. HOWE
Presiding Administrative
Law Judge

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